Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO C23-1211-86
VC GEORGE J
24 OCTOBER 1989

Civil Procedure — Garnishee order — Made absolute in garnishee's absence — Application to set aside order — Jurisdiction of the court to set aside the order — Rules of the High Court 1980, O 32, O 49 & O 92

On 5 February 1988, the plaintiff had judgment entered against the defendant in the sum of $200,000 and $350 costs. On 1 March 1988, the plaintiff, on an ex parte application, obtained a garnishee order nisi against Gamuda Sdn Bhd ('the garnishee'). The garnishee order required the garnishee to attend before the senior assistant registrar to show cause why the order nisi should not be made absolute. The order nisi, but not the ex parte summons and the supporting affidavit by which the order nisi was sought and obtained, was duly served on the garnishee. On 13 April 1988, in the garnishee's absence, the senior assistant registrar, on the basis that the garnishee had not attended the hearing, made the order absolute. On 5 July 1988, the garnishee took out this application to have the garnishee order absolute set aside. The senior assistant registrar took the view that she was functus officio vis-a-vis the order absolute and as such had no jurisdiction to entertain the application. She made no order on the application. The garnishee appealed.

Held, allowing the garnishee's appeal:

(1) In an inter partes application, where the defendant is absent though he has been duly served, the court may proceed to hear the matter and while the application so heard is not an ex parte application, the hearing in the absence of the defendant is an ex parte hearing and the order made on such a hearing is an ex parte order. Therefore, the order made on 13 April 1988 was an ex parte order made in chambers, and the court has jurisdiction provided by O 32 r 6 to have it set aside.

(2) In a situation where there arises a lacuna in the face of the rules which causes a procedural injustice, in that it cannot be said that the rules contain provision making available sufficient remedies, the court is not only entitled to but is obliged to make any order as may be necessary to prevent the injustice.

Cases referred to

1 *United Overseas Bank Ltd* v *Chung Khiaw Bank Ltd* [1968] 2 MLJ 85 (folld)
2 *UMBC Bhd* v *Syarikat Perumahan Lunas Sdn Bhd* [1988] 1 MLJ 546 (folld)
3 *Permodalan MBF Sdn Bhd* v *Tan Sri Datuk Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178 (refd)

Legislation referred to

Rules of the High Court 1980 O 32, O 49, O 92

Plaintiff/respondent in person.

Jagjit Singh (*BL Teo* (*Ms*) with him) for the garnishee/appellant.

Cur Adv Vult

VC George J: On 5 February 1988, the plaintiff had judgment entered against the defendant in the sum of $200,000 and $350 costs. On 1 March 1988, the plaintiff, on an ex parte application, obtained a garnishee order nisi against Gamuda Sdn Bhd ('the garnishee') by which all debts due or accruing due from the garnishee to the judgment debtor was attached to answer the said judgment. The garnishee order nisi also stated that the garnishee was required to attend before the senior assistant registrar on 16 March 1988 to show cause why the order nisi should not be made absolute.

The order nisi was duly served on the garnishee. The ex parte summons and the supporting affidavit by which the order nisi was sought and obtained do not appear to have been served on the garnishee. Now, although 16 March 1988 was the appointed date for cause to be shown, it would appear that the application was in fact heard and disposed of on 13 April 1988 when the plaintiff judgment creditor was represented by counsel but the garnishee was absent. The senior assistant registrar, pursuant to O 49 r 4(1) on the basis that the garnishee had not attended at the hearing, made the order absolute.

On 5 July 1988, the garnishee took out this application (encl (60) in the court file) seeking to have the garnishee order absolute of 13 April 1988 set aside. The senior assistant registrar took the view that she was functus officio vis-a-vis the order absolute and as such had no jurisdiction to entertain the application. She made no order on the application. The garnishee appealed. I heard arguments on the jurisdictional point and reserved judgment which I now deliver.

Order 49 r 3(1) provides that on the date appointed for that purpose in the garnishee order nisi, there will be a 'further consideration of the matter'. Order 49 r 4(1) also provides that the order to be made is 'on the further consideration of the matter'. 'The matter' is obviously the original application for an order under O 49 r 1 for the garnishee to pay to the judgment creditor the amount of any debt due or accruing due from the debtor to the garnishee sufficient to satisfy the judgment and the costs of the garnishee proceedings. What was heard initially as an ex parte application has to be reheard as it was on an inter partes basis. I pause to note that if that is so and I have no doubt that it is so, then it seems to me that not only must a copy of the order nisi be served on the garnishee as was done here but a copy of the application and supporting affidavits must also be served on the garnishee (which does not appear to have been done in the instant case) before there can properly be a further consideration of the matter.

Now, a strong quorum of the Singapore Court of Appeal had held in *United Overseas Bank Ltd* v *Chung Khiaw Bank Ltd*[1] at p 87 that where the defendant though served fails to appear, the order made in an inter partes application is an ex parte order:

The first question for consideration is whether or not the order made on the originating summons was an ex parte order and comes within O LIII r 4(1).

The originating summons in this case was served on Tay Soo Tong by substituted service and he had made no appearance and in such a case O LI r 16 provides:

> 'Where any party who had been duly served fails to attend at the time appointed for the hearing, the judge may proceed ex parte, if he thinks it expedient to do so and may require such evidence of service as he thinks fit.'

It is clear then that a judge may proceed ex parte to hear an application where a party duly served fails to appear at the time appointed for the hearing.

An application so heard in the absence of a party is not an ex parte application. It is the hearing which is ex parte and an order made on such a hearing is an ex parte order within the terms of O LIII r 4(1).

This dictum was considered and applied by Edgar Joseph Jr J in *UMBC Bhd* v *Syarikat Perumahan Lunas Sdn Bhd*[2] at p 547. What is relevant for the purposes of the instant case is the ratio decidendi that resulted in the Singapore Court of Appeal in the former and Edgar Joseph Jr J in the latter case holding that in an inter partes application, where the defendant is absent though he had been duly served, the court may proceed to hear the matter and that while the application so heard is not an ex parte application, the hearing in the absence of the defendant is an ex parte hearing and the order made on such a hearing is an ex parte order. Applying that ratio to the instant case, it cannot but be held that the order made on 13 April 1988 was an ex parte order made in chambers.

Now the application in the instant case that resulted in the making of the order nisi and on its further consideration in the said order being made absolute was a summons to be proceeded with in chambers. Order 32 sets out the rules for 'Applications and Proceedings in Chambers'. These rules in O 32 have general application to applications and proceedings in chambers unless there are specific rules elsewhere that expressly or even impliedly do away with the said rules of general application.

Encik Loo Chay Meng, the plaintiff, who argued his own case with commendable skill and learning, submitted, inter alia, that since there are special rules in respect of garnishee proceedings, namely, the rules in O 49, the rules in O 32 have no application to garnishee proceedings.

That such a submission has no merit can be illustrated by asking for instance one or more of the following questions: When does the summons referred to in O 49 r 2 issue? What form does it take? Can its hearing be adjourned from time to time? Can a writ of subpoena to compel the attendance of a witness for the purpose of the proceedings be issued? And can the court obtain the assistance of experts in order to enable it to better determine this matter?

These are some of any number of questions that could be raised vis-a-vis any proceedings in chambers including one whose genesis is O 49. However, O 49 does not provide answers to any of these questions. Accordingly, to obtain the answers one has to look elsewhere in the rules and the obvious place to look is at the rules of general application which are in O 32 which in fact provides the answers to all of those sample questions, eg O 32 r 1 provides that the summons should be in form 62; r 2(1) provides that its issue takes place on it being sealed; and so on.

In as much as O 49 is silent, say, in respect of the form the application for a garnishee order should take, it is equally silent in respect of the court's jurisdiction to set aside an ex parte order made in the O 49 application. However, just as O 32 r 1 provides the answer as to what form should be used in making such an application, O 32 r 6 provides the answer as to the extent of the court's jurisdiction in respect of ex parte orders. 'The court may set aside an order made ex parte' says r 6 and it is of general application and in my judgment it may and should be applied in O 49 proceedings where relevant.

Having concluded as I have done that the order made on 13 April 1988 was an ex parte order, it follows that the court has jurisdiction provided by O 32 r 6 to have it set aside.

It was contended by Encik Jagjit Singh, counsel for the garnishee appellant, that in any event the court also has jurisdiction to set aside the order absolute pursuant to O 92 r 4 by invoking its inherent jurisdiction to prevent injustice or an abuse of the process.

Encik Loo Chay Meng referred to the judgment of the Supreme Court in *Permodalan MBF Sdn Bhd & Ors* v *Tan Sri Datuk Hamzah bin Abu Samah & Ors*[3] to submit that where specific power is given the inherent jurisdiction cannot be utilized. I assume that the lines in the judgment he particularly had in mind are those appearing at p 181:

> It follows that where the rules contain provision making available sufficient remedies, the court will not invoke its inherent powers.

He went on to argue that in his view, where the rules make no provision for a situation, the inherent power cannot be invoked unless it can be implied that the rules were intended to provide for the situation but had failed to do so. He then appears to have contradicted himself by submitting that the inherent power can only be used where there is a lacuna in the face of the rules which causes a procedural injustice.

If O 32 r 6 cannot be applied in an O 49 situation, then we have a situation of 'a lacuna in the face of the rules which causes a procedural injustice' in that it cannot be said that the 'rules contain provision making available sufficient remedies'. In my judgment, in that kind of

situation and if there is injustice, the court is not only entitled to but is obliged to make any order as may be necessary to prevent the injustice.

In the instant case, O 32 r 6 gives the court the jurisdiction to set aside the ex parte order absolute. Alternatively, if O 32 r 6 is not applicable in an O 49 situation, then the court has the jurisdiction to set aside the order invoking its inherent jurisdiction. I will now hear arguments on the merits.

Order accordingly.

Solicitors: *Vincent Lim & Teoh.*

Reported by *Kevin Mathews*

Perwira Habib Bank Malaysia Bhd v Oon Seng Development Sdn Bhd

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 24(31)-540-87
MOHAMED DZAIDDIN J
5 OCTOBER 1989

Land Law — Order for sale of charged property — Application to oppose order — Prior purchasers claiming — Whether prior purchasers have shown 'cause to the contrary' — National Land Code 1965, s 256(3)

The plaintiffs applied against the first defendants for an order for sale to sell the charged property, which was granted on 13 September 1989. The second, third and fourth defendants, in opposing the said application, prayed that no order for sale be made against their respective individual lots on the ground that they were bona fide purchasers for value of these lots affected by the said order. The sole issue in these applications by the second, third and fourth defendants is whether or not they have shown a 'cause to the contrary' within the meaning of s 256(3) of the National Land Code 1965.

Held, dismissing the defendants' application:

(1) The second, third and fourth defendants have failed to show any 'cause to the contrary' within the meaning of s 256(3) of the National Land Code 1965 to enable the court to refuse the plaintiffs' application to sell the lots in the application.

(2) As bona fide purchasers for value, their interest cannot prevail over that of the plaintiffs, the registered chargee. Unless fraud is an issue and could be proved, the charge which had been legally registered becomes indefeasible.

(3) As the purchase agreement contained an express condition that the lot was sold subject to an existing charge in favour of the plaintiffs, the interest of the purchaser who had expressly consented to the creation of the said charge cannot override the registered interest of the plaintiffs as chargee.

(4) There was no suggestion by the second, third and fourth defendants that the charge created by the first defendants in favour of the plaintiffs was fraudulent or was intended to defeat the interest of the purchasers under the purchase agreement. On the other hand, it would be implied that they knew of the incumbrances attached to the sale of these lots.

Cases referred to

1 *Keng Soon Finance Bhd* v *MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 (folld)
2 *Tai Lee Finance Co Sdn Bhd* v *Official Assignee & Ors* [1983] 1 MLJ 81 (folld)

Legislation referred to

National Land Code 1965 s 256(3)

Khaw Cheow Poh for the plaintiffs.
Margeret Kam Swee Lin (Miss) for the first defendants.
See Ewe Lin for the second defendants.
Goh Eng Kee for the third defendants.
Syahril Redwan for the fourth defendants.

Cur Adv Vult

Mohamed Dzaiddin J: Arising from an application by the plaintiffs against the first defendants for an order for sale under s 256 of the National Land Code 1965 to sell the charged property, the said order of which was granted by me on 13 September 1989, the second, third and fourth defendants, in opposing the said application, prayed that no order for sale be made against their respective individual lots on the ground that they were bona fide purchasers for value of these lots affected by the said order.

From the supporting affidavits of these defendants, I accept that they were purchasers of the individual lots under the schedule to the annexure of the charge executed by the first defendants with the plaintiffs. All of them executed the sale and purchase agreements with the first defendants. They claimed that they had fully paid the purchase price of their lots, which they had raised through government housing loans. Although the second defendants did not exhibit a copy of the said agreement to the affidavit of Mr Wong Soon Fong, nevertheless, from a copy made between the first defendants as vendor and the third defendant as purchaser dated 1 April 1982, it is clearly stated that the whole piece of the property before subdivision was charged by the vendor to the plaintiffs with the knowledge and approval of the purchaser. As for the fourth defendant, he claimed to be entitled to his respective lots in accordance with the terms of an agreement which he entered with the first defendant on 16 November 1978, which is the subject matter of an action pending in this court.

Counsel for the second and third defendants submitted that their clients were bona fide purchasers for value of the respective lots affected by the order dated 13 September 1989. In the case of the fourth defendant, he claimed to have a prior right to the affected lots because he had already paid the total purchase price before the said property was charged by the first defendants to the plaintiff. Hence, on the above grounds they urged the court to